Supreme Court, U.S.
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CLERK

(2)

No. 95-1734

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

M.H., Petitioner

v.

T.J., M.D., and C.J., Respondents

RESPONDENT M.D.'S MOTION TO PROCEED IN FORMA PAUPERIS

M.D., Respondent, through undersigned counsel, moves this Court for an order permitting her to participate in this proceeding without payment of fees and costs and without giving security. As reasons M.D. relies upon her Affidavit which is submitted with this Motion.

Respectfully submitted,

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Court Appointed Counsel for
M.D., Respondent

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CERTIFICATE OF SERVICE

I, Harvey Schweitzer, a member of the Bar of this Court, hereby certify that on the 28th day of May, 1996, copies of Respondent M.D.'s Motion to Proceed In Forma Pauperis and Affidavit were mailed postage prepaid first class to:

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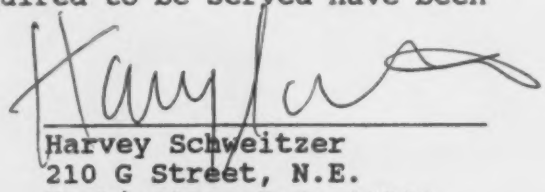
I further certify that all parties required to be served have been served.



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RESPONDENT M.D.'S AFFIDAVIT IN SUPPORT OF HER MOTION TO PROCEED IN FORMA PAUPERIS

I, Mary Davis, do now state and affirm that I am a respondent in the above-entitled case; that in support of my Motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this proceeding or to give security therefor; that I believe that I am entitled to participate in this proceeding and that I desire to oppose the Petition for a Writ of Certiorari, and if such Petition should be granted I wish to file briefs and other motions as my interests might require.

I further affirm and state that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of this proceeding are true.

1. Are you currently employed?

Answer: No. I am disabled. I cannot remember my last employment or salary.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: Yes. I receive Supplemental Security Income (SSI) of about $470.00 a month.

3. Do you own any cash or checking or savings accounts?

Answer: No.

4. Do you own any real estate, stocks, bonds, note, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to that person.

Answer: I care for a minor child, Angela, the sister of Respondent T.J. This child receives Aid to Families with Dependent Children (AFDC) payments.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on May 23, 1996.

X Mary L Davis

Mary Davis

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____

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Harvey Schweitzer
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COURTER-STATEMENT OF THE QUESTION PRESENTED

Whether, in a consolidated proceeding to grant either a custody complaint consented to by competent parents or an adoption petition opposed by the parents, a highly suitable custody complainant is entitled by reason of parental choice to prevail, absent clear and convincing evidence that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest?

TABLE OF CONTENTS

Counter-statement of the question presented i

Table of Contents ii

Table of Authorities iii

Statement 1

Reasons for Denying the Writ 7

Introduction 7

Refutation 10

I. The Court of Appeals did not significantly extend the scope of this Court's decision in Santosky. 10

II. The "Divergent Determinations" alleged among state courts do not exist when the procedure is properly viewed in its entirety. 12

III. The Court of Appeals' decision does not represent an incursion of constitutional impediments on the State's parens patriae powers. 13

Conclusion 14

TABLE OF AUTHORITIES

CASE

Santosky v. Kramer, 455 U.S. 745 (1982) p.7,9,10

STATUTE

D.C. Code Ann., Title 16 Section 304(e) 5

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 95-1734

M.H., Petitioner

v.

T.J., M.D., AND C.J., Respondents

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The decision under review incorporates into the best interest of the child standard the constitutionally-recognized rights of parents to designate custodians of their child. When parents seek, as they do in this case, to preserve a child in a family against a person seeking to destroy that child's family relationships, the parents' choice has legal significance that should not be set aside, except by clear and convincing evidence establishing that preservation of the parent-child relationship and the proposed family placement is not in the child's best interest.

The decision under review is quite limited in its scope, because the Court of Appeals carefully crafted its decision to restrict the breadth of its ruling. Petitioners seriously misstate the meaning and reach of the decision, which is quite narrow and carefully limited to the facts of this case. The District of Columbia Court of Appeals expressly tailored its holding in several ways:

> This case presents the issue of what right, if any, a mother (parent) retains, with respect to the selection of a custodian for her child, where: the mother's parental rights have not been terminated; she has not relinquished those rights; she is not mentally incompetent to plan for her child's future, but is unable by reason of her mental condition to take personal care of her child; and she has not been adjudicated as a mother who failed, voluntarily, to provide proper parental care. [Footnote omitted.]

Petitioner's.Appendix, 15a.

If that did not narrow the scope of its decision enough, the Court of Appeals went on to further limit it:

> We do not speak here of situations where a parent withholds consent to an adoption, but has not devised any alternative plans for the permanent placement of the child. Nor are we addressing the standard to be applied in those circumstances where the parent has been found in a judicial proceeding to have abused the child. We are dealing only with the custody wishes of a parent who, through no fault of her own, is unable to care properly for her child.

Pet.App., at 19a, f10.

Here, custody of T.J. was desired by the mother's aunt, who had cared for him in the past and who was caring for his twelve-year-old sister. Custody of T.J. was also desired by his foster mother, M.H., who had cared for him under contract as a non-adoptive foster mother.

This custody controversy followed upon judicial intervention in T.J.'s life. It became clear that T.J.'s mother was not able to provide continuous care for him, and a neglect proceeding was initiated. A judicial proceeding established that T.J. was a neglected child, based solely on his mother's mental incapacity.

When T.J. was initially taken into government care, pursuant to the neglect petition, he was placed by the Department of Human Services in an institutional infant home, where he remained until the neglect adjudication. Shortly after T.J. was adjudicated neglected, the Department of Human Services contracted with "For Love of Children" (FLOC), a private foster care agency. M.H. was one of those foster care providers licensed and under contract with FLOC. Among the provisions of that contract was a recognition that foster care is a temporary service with a goal of returning the child to the birth parents, if possible, and if not, to birth relatives. Pet.App., at 6a.

T.J. did well with M.H. The social workers sought to establish plans for T.J.'s permanent placement. They decided to place T.J. with M.D., his great-aunt, and planned to request a change of placement to the great-aunt at a court hearing scheduled for November 18, 1992. M.H. learned of that plan and filed a petition to adopt T.J. on November 5, 1992. At the hearing on November 18, the judge reviewing the neglect proceeding rejected the proposed immediate change of placement to the great-aunt proposed by the government, but ordered immediate psychological assessment and home studies. The great-aunt

subsequently filed for permanent legal custody, with the consent of both parents.

The adoption petition was consolidated with the custody complaint and the neglect case. The parties to the consolidated proceeding were M.H., who supported the adoption, and the District of Columbia, T.J., through his Guardian ad litem, C.J., his mother,and D.L., his father, and M.D., all of whom supported the custody. The competing adoption and custody requests were heard together.

The evidence showed that the foster mother had done a good job with T.J., and he had thrived while with her. She and the child were emotionally bonded. Breaking that bond would cause some distress to T.J. The degree and permanency of the expected distress from separation was disputed by the several expert witnesses. The benefits of placing T.J. with his great-aunt were also presented. With his great-aunt, T.J. would be raised with his sister in a loving and effective home. Evidence with respect to the great-aunt showed that she was an exceptionally able custodian, who was currently doing an excellent job of raising T.J.'s sister. Her home was the hub of the extended family that would provide significant benefits to T.J., if he were placed with her.

Evidence also established that the mother herself would not likely ever be able to care for T.J. The father had not been significantly involved in T.J.'s life, and was not considered as a potential custodian. Given the proffers of two clearly

suitable custodians, the court was clearly going to grant either the great-aunt's request for permanent legal custody or the foster mother's request for adoption.

The trial court found that both the adoptive petitioner and the great-aunt seeking permanent custody were outstanding people. The trial court concluded that, on balance, the adoption petitioner provided the better alternative for T.J. and should be granted.

The trial court used a two-step analysis in making its determination. Step one was to evaluate the evidence concerning the adoption petition. When evaluated without reference to the evidence concerning the complaint for custody, the court found that the adoption was shown to be in T.J.'s best interest. As against T.J.'s mother's objection to the grant of the adoption petition, the court found that the mother's refusal to consent was inconsistent with T.J.'s best interest and should therefore be waived. The waiver of consent is allowed under D.C. Code §16-304(e).

The grant of an adoption has the effect of terminating parental rights by operation of law. Therefore, in proceeding to the second step in its analysis, i.e., evaluation of the relative merits of the custody and the adoption, the court considered that the mother's rights had been terminated.

In its second step, the trial court evaluated the evidence supporting the great-aunt's custody complaint. Although the trial court was impressed by the great-aunt, it held that the

evidence supporting the custody complaint was, on balance, somewhat less than the evidence supporting the adoption. It credited the expert who opined that moving T.J. would result in permanent harm, rather than the experts who said that T.J. could adapt to custody by the great-aunt, with whom he had previously lived. Using a "preponderance of the evidence" standard to determine whether to grant the adoption or the custody, the court held that the adoption should be granted.

The Court of Appeals reversed, saying:

> The trial court erred in bifurcating two interrelated issues, disposing of the merits of the mother's retention of custody of the child herself as against the merits of the prospective adopter's claim, applying a clear and convincing standard, and then weighing the great-aunt's petition for custody against the petition for adoption applying the preponderance of the evidence standard. The major fallacy in this approach is that it gave far too little weight to the mother's right to choose the custodian for her child by applying an incorrect standard of proof to that consideration. [footnote omitted.]

Pet.App., at 17a. The court went on to state:

> The trial court, however, did not find, and we think from this record could not find, by clear and convincing evidence, that placement of the child with the great-aunt would be clearly contrary to the child's best interest. (footnote omitted).

Pet.App., at 29a. The appellate court directed the trial court to vacate the adoption and grant the custody. Pet.App., at 30a.

Petitioners sought re-hearing and re-hearing en banc. Re-hearing was denied by the panel, and re-hearing en banc was denied by a vote of the majority of the court. Pet.App., 41a. Two judges filed dissents, both of which focused on the appellate panel's directive to the trial court that it grant the custody.

Pet.App., 43a and 48a. Neither dissenting opinion adopted petitioner's claims that the merits panel of the Court of Appeals had prescribed an erroneous burden of proof in this case.

REASONS FOR DENYING THE WRIT

Introduction

Petitioner seeks to persuade this Court that the District of Columbia Court of Appeals has, in a ruling of broad impact, erroneously extended the scope of this Court's requirement that a parent-child relationship not be terminated on less than clear and convincing evidence. That alleged extension of the evidentiary requirement established in Santosky v. Kramer, 455 U.S. 745 (1982) is purported to impinge upon the exercise of the State's parens patriae duty. Petitioner further asserts that there are divergent appellate opinions on the issue at bar, requiring resolution by this Court. To the contrary, the Court of Appeals was circumspect in crafting a narrowly-applicable decision that does not impinge on the ability of states to protect children.

Before refuting petitioner's specific arguments, it should be noted that petitioner makes two major errors in her presentation to this Court. When those errors are excised, her petition fails utterly to satisfy the criteria for review by this Court.

First, petitioner assumes the validity of the two-step process by which the trial court terminated the parental rights

of the mother by granting the adoption of the foster mother before considering the custody complaint of the aunt and the relative merits of the custody and adoption. Had that two-step process been legally permissible, the burden of proof may rightly have been a preponderance of the evidence, as in custody litigation between parties unrelated to the child.

As observed by the Court of Appeals, the two-step process employed by the trial court ignored the fact that the custody, adoption, and neglect proceedings were consolidated for the custody and adoption trial. The purpose of such consolidation is to assure that the fact-finder has before him the entire record, so that a fully-informed judgment can be made. By its two-step analysis, the trial court treated the adoption and custody like two separate proceedings, with the adoption coming first. Grant of the adoption before considering the custody would emasculate the custody by removing its parental support as a result of the prior termination of the parental rights that is a consequence of an adoption. So treated, the aunt would be a legal stranger to T.J., as would the mother, following termination of her parental rights through the adoption. Parental consent to the aunt's complaint for custody would have been made irrelevant. Familial bonds would have been legally severed. The foster mother, with more recent custodial ties and psychological bonding, would likely have prevailed.

Petitioner appears not to have noticed the Court of Appeals' rejection of the two-step analysis of the trial court. She does

not argue that the appellate court was erroneous in that rejection. She simply goes back to the two-step analysis of the trial court as if it were set in stone and uneroded by the Court of Appeals' decision. Unless the integral approach of the Court of Appeals is shown by petitioner to be in error--and we submit that it was not and cannot be--petitioner's rationale for certiorari must fall.

Second, petitioner repeatedly asserts that the Court of Appeals pitted the best interest of the child against the right of the mother to direct the upbringing of her child. On the contrary, the Court of Appeals repeatedly states that it holds the child's best interest as the determining factor, and that the parent's selection of a custodian is a valid and necessary component of the determination of the child's best interest.

The Court of Appeals made explicit its adherence to the best interest of the child standard in ruling on this case. The court said,

> We agree with the foster mother's observation that the child's best interest should be the determining factor for the trial court. The natural mother's views, however, at least under the circumstances presented here, must be taken into consideration in determining what is in the child's best interest. [citations omitted] Moreover, in this case the guardian ad litem, i.e., the child's representative, DHS, and FLOC, the agency with legal custody of the child, all support the mother's choice of custodian.

Pet.App., 25a.

Refutation

I. **The Court of Appeals did not significantly extend the scope of this Court's decision in Santosky.**

The Court of Appeals' ruling upheld the principle that this consolidated proceeding must be viewed as a whole, rejecting the two-step analysis in which the trial court terminated the parents' rights by granting the adoption, and then went on to deny the custody as if the parents had no rights. When seen without the impairment of tunnel vision, it is a reasonable, equitable, and logical implication of Santosky that the same evidentiary standard that must be applied to the adoption, which would terminate parental rights, must also be applied to the custody, which would preserve them, in a consolidated proceeding. Since the foster mother was the only party opposing custody, that burden of proof must fall on her shoulders as part of the consolidated proceeding. The Court of Appeals did not significantly extend the scope of Santosky by requiring that the foster mother prove by clear and convincing evidence both that the adoption should be granted and that granting the designated custodian's complaint for permanent custody is contrary to the best interest of the child.

Viewing the proceeding in its entire mosaic, the Court of Appeals properly accorded the mother's right to select a custodian the weight that such a choice must be given when there has been no termination of parental rights. The mother's private interest was duly weighed, as were those of the other parties.

In this case, the foster mother was the only party adversely affected by the decision, since the aunt's complaint for custody was supported by the child,, the mother, the father, the District of Columbia, and the two social service agencies responsible for T.J.'s care. All of the parties in this cases acted appropriately except for the foster mother, who violated her contract when she petitioned to adopt T.J. less than eight months after he was temporarily placed in her care, despite a consensual plan for reunification with the aunt.

Given the purpose of the foster care system to provide temporary care pending reunification with a parent or family member, it is manifestly consistent with that purpose that a foster mother bear the same burden of proof as would the State, had it opposed the mother's plan for reunification set forth in the aunt's custody complaint. As it was, however, the aunt's custody complaint articulated the State's own plan for reunification, as well as the mother's.

Petitioner would have this Court believe that this case pits the powers that be against poor little T.J. and his beleaguered foster mother. First, T.J.'s interest, as perceived and advocated by his Guardian ad litem, his parents, and the State, and its social service agencies, is adverse to that of the foster mother. Second, as stated above, the foster mother initiated the adoption in violation of her agreement to provide temporary foster care and to support the permanency plan advocated by the agency, which was reunification with the aunt. She has been

represented in these proceedings by numerous retained and pro bono counsel, with no expense spared to assert an interest which she arrogated to the detriment of the mission and administration of the foster care system.

Contrary to petitioner's claim, the State's interest is not affected by the evidentiary standard promulgated by the Court of Appeals. If the State has prosecuted a Termination of Parental Rights against the mother, it would have been required to present clear and convincing evidence. When she initiated the adoption petition, the foster mother knew that she must prove by clear and convincing evidence that the consents of the birth parents should be waived and that the adoption was in the best interest of the child. In this case, the State, through its child care agency, opposed the adoption in favor of the custody. In any event, the State's interest is not affected by the Court of Appeals' requirement that the adopter defeat the parent's designated custodial arrangement, made pursuant to intact parental rights, by the same standard. Were the State, rather than a foster mother, seeking to terminate a parent's right to direct the upbringing of a child, the State would naturally expect to bear the same burden as when seeking to terminate all other parental rights.

II. The "Divergent Determinations" alleged among state courts do not exist when the procedure is properly viewed in its entirety.

Petitioner argues that state courts are divergent in decisions regarding the weight to be given parental choice of custodian. The alleged divergence is created by comparing cases in which there has previously been a termination of parental rights or extremely serious neglect justifying termination with cases in which no such termination of parental rights was adjudicated or would be appropriate. Unlike the West Virginia and California cases cited by petitioner, this consolidated proceeding did not involve termination of parental rights on the basis of permanent neglect. Nor was it subsequent to evidentiary proceedings establishing a basis for termination. Indeed, there was no contemplation by the government or by the Guardian ad litem of a termination proceeding, since both favored a custodial arrangement that would preserve family relationships. (Only the government or the guardian ad litem could have initiated and prosecuted a termination proceeding.) The circumstances in the cases cited are thus distinct from those in this case, and do not represent divergent opinions on the same issue. This Court does not need to review the decision here to resolve divergent opinions.

III The Court of Appeals' decision does not represent an incursion of constitutional impediments on the State's parens patriae powers.

Again, petitioner insists upon casting the Court of Appeals' analysis as pitting the child's best interest against the parents' rights. The Court of Appeals explicitly stated that it

did not view the issue in terms of that dichotomy, and that it found consideration of the child's best interest to include consideration of the parent's custodial choice. Petitioner has done to death her arguments about the two-step process, as well as her argument that the court pitted best interest against parental rights.

CONCLUSION

For the foregoing reasons, M.D. respectfully requests that this Court deny the Petition for Certiorari.

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